Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	

REPLY COMMENTS OF OPTEL, INC.

OpTel, Inc. ("OpTel"), submits this reply in response to the comments filed in the above-referenced proceeding.

INTRODUCTION

In its initial comments, OpTel demonstrated that the Commission could implement the terms of the 1996 Act with a set of consistent and uniform rule changes that would promote competition in the multichannel video distribution market and maximize consumer welfare. In particular, OpTel urged the Commission to: (1) require that cable operators face truly effective, "effective competition" from LEC-affiliated video programmers before being released from rate regulation; (2) limit the definition of "bulk discounts" to its ordinary and customary meaning (*i.e.*, discounts deducted from bulk payments by property owners or managers on behalf of the residents of an MDU); (3) reject suggestions that it change the "MDU" definition to include properties other than multiple dwelling units; and (4) adopt a "predatory" pricing standard that will provide competitors with meaningful protection from anticompetitive acts by cable operators.

By contrast, the comments submitted by the franchised cable operators and their interests in this proceeding advocate rules designed to advance one purpose — the protection of franchised cable's monopoly stranglehold on the market. In essence, the franchised cable operators have asked that the Commission ignore the present state of the market and regulate as if the market already were fully competitive. Such an approach, if adopted, would doom the cause of competition and frustrate the purpose of the 1996 Act.

DISCUSSION

I. THE FRANCHISED CABLE MONOPOLISTS SHOULD NOT BE UNLEASHED ON THE NEWLY COMPETITIVE MARKET UNTIL THEY FACE EFFECTIVE "EFFECTIVE COMPETITION."

Under Section 301(b)(3) of the 1996 Act, cable operators now will be deemed to face "effective competition" if a LEC-affiliated video programming distributor[1] offers video services to subscribers in the franchise area, by any means other than direct-to-home ("DTH") satellite services, that are "comparable" to those offered by the franchised operator. The franchised cable interests have, in their comments, advocated implementing regulations for this section that, in effect, read "effectiveness" out of the "effective competition" standard. OpTel urges the Commission to reject their proposals.

A. "Comparable" Programming Should, In Fact, Be Comparable.

To begin with, the Commission should reject efforts of the franchised cable operators to dilute the standard for what constitutes "comparable" programming. Cox Communications, Inc. ("Cox"), for instance, argues that the ability to offer local broadcast signals is not important in determining whether programming is comparable and that, even if an MVPD competitor does not offer local broadcast signals, "effective competition exists if the operator demonstrates that some broadcast signals are available over-the-air in a franchise area."[2] In support of this proposition, Cox refers to the popularity of DBS systems that do not offer local broadcast signals.

The syllogism is flawed. Cox has pointed to the popularity of apples and declared that they must, therefore, be comparable to oranges, which also are popular. In fact, the availability of local broadcast programming is extremely important to viewers, who often continue to subscribe to cable service, even if they do subscribe to DBS service, in order to receive local broadcast stations.[3] Lacking the ability to provide these stations, it is unlikely that DBS service alone ever will provide "effective competition" to local cable service.

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[1] For the reasons set forth in the reply comments of the Independent Cable & Telecommunications Association, of which OpTel is a member, OpTel urges the Commission to apply the Title VI definition of "affiliate" to determine affiliation for these purposes.

[2] Comments of Cox Communications, Inc., at 4-5.

[3] See, e.g., Ray Richmond, Variety, June 9, 1996 at 30 ("many dish-equipped homes have continued to subscribe to cable [because] cablers offer local broadcast signals that DBS currently cannot"); Mark Landler, New York Times, "The Dishes Are Coming: Satellites Go Suburban" (May 29, 1995) (many urban DBS viewers continue to subscriber to cable service to get local broadcast stations).

Thus, for an MVPD that does not provide local broadcast signals to constitute effective competition to a franchised cable company, it cannot be sufficient that "some broadcast signals are available over-the-air in the franchise area." The issue before the Commission is not whether viewers may receive certain programming by any means or combination of means, but whether any single competitor is providing "effective competition" to a franchised operator. An MVPD that cannot provide a full range of programming, including the special features that only locally produced programming can offer, cannot possibly provide "effective competition" to a franchised cable operator.

For similar reasons, suggestions that "superstations should ... count as broadcast signals" for purposes of determining whether programming is comparable also should be rejected.[4] Notwithstanding the franchised cable interests' suggestion that, "[a]side from the method of delivery, there is nothing to distinguish superstations from other broadcast signals,"[5] there is a significant qualitative difference between local and "superstation" broadcast programming. Local broadcast stations provide news, information, and programming uniquely tailored to the communities they serve. Superstations, on the other hand, "are aimed at a national audience .... [t]hey do not, as a rule, run programming of interest solely or primarily to viewers in one region of the country."[6] For that reason, the Commission traditionally has treated superstations as local broadcast stations only within their local markets and as basic cable networks elsewhere.[7] The cable interests have offered no reason to deviate from that approach in this case.

B. Cable Operators Should Be Required To Demonstrate That A LEC-Affiliated Provider's Programming Actually Is Having A Restraining Effect On Rates Under The New Effective Competition Standard.

In its initial comments, OpTel suggested that a cable operator seeking to escape rate regulation should be required to show that it faces actual effective competition from a LEC-affiliated provider under the new "effective competition" test. In order to facilitate this process, OpTel suggested that the Commission establish a bright line rule, based on the relative service availability of the franchised cable operator and the would-be competitor, to determine the extent to which a LEC-affiliated programmer actually was providing competition to a franchised cable operator. Such a test for effective

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[4] See Comments of NCTA at 4-5; Comments of Cox at 6; Comments of Adelphia Communications et al., at 3.

[5] E.g., Comments of Cox at 6.

[6] In re Compulsory Copyright License for Cable Retransmission, 4 FCC Rcd 6711, 6730 (1989).

[7] See, e.g., In re Inquiry Into Sports Programming Migration, 8 FCC Rcd 4875, 4876 (1993).

competition would ensure that the LEC-affiliated entity can provide a real check on the competitive practices of the franchised operator seeking to escape rate regulation.

The comments filed by the cable operators do not present any argument that would undermine this position. Instead, the franchised cable interests continue to argue that the lack of an absolute pass rate in the statute deprives the Commission of any authority to interpret the legislative language of the new effective competition prong in its implementing rules.[8] To the contrary, the Commission in this instance is presented with a classic "Chevron step II" case.[9]

In the 1996 Act, Congress has added a fourth effective competition standard that releases cable operators from rate regulation when a local exchange carrier offers video programming that is comparable to that offered by the franchised cable operator. Congress has not specified what it means to "offer" video programming and it has not defined that which constitutes "comparable" programming. Whatever congressional intent may be divined from the omission from this section of any absolute pass rate, it does not inform the meaning of these otherwise ambiguous terms or imply that the Commission may not impose other service standards to measure the competition provided by a LEC-affiliated MVPD. Thus, there is considerable ambiguity in the statute open to, and requiring, Commission interpretation. For the reasons set forth in OpTel's initial comments, the Commission should interpret those terms in a manner that will ensure that cable operators actually face effective competition before they are released from rate regulation.

C. LEC-Affiliated SMATV Systems Should Be Deemed To Be DTH Systems For Purposes Of Section 623.

Several cable operators have opposed the suggestion that SMATV systems should be deemed to be DTH services for purposes of Section 623.[10] These parties

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[8] See, e.g., Comments of Time Warner Cable at 13-15; Comments of Cox at 8-9; Comments of Adelphia et al., at 8-10; Comments of NCTA at 8-10.

[9] See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue .... [I]f the statute is silent or ambiguous with respect to the specific issue, the [second] question for the court is whether the agency's answer is based on a permissible construction of the statute.")

[10] See Comments of Cox at 7-8; Comments of Adelphia et al., at 6-7. Ironically, having argued that the provision of local broadcast programming is inconsequential in determining whether an MVPD can provide "effective competition," NCTA seeks to differentiate SMATV and DTH services for these same purposes on the basis that SMATV services provide local broadcast programming, whereas DTH services do not. Comments of NCTA at 11-12. In fact, SMATV services merely combine the satellite and broadcast antenna features for all residents of an MDU. The fact that a DTH subscriber in a single family

misunderstand the basic SMATV architecture in MDUs. SMATV systems are the MDU equivalent to a DTH system. The only difference between the two is that the subscribers to a SMATV system in an MDU share the satellite antenna.[11] Such sharing is necessary, of course, both for technical and aesthetic reasons. Technically, it often is impossible for each unit to have its own satellite dish because some of the units cannot "see" the satellite. However, even if every unit in an MDU could have its own dish as a technical matter, the residents still may choose to share a single dish rather than allow the appearance of their building to be marred by the prominent display of a satellite dish in each window or on each patio.

II. THE UNIFORM RATE REGULATIONS SHOULD PROVIDE MEANINGFUL PROTECTION AGAINST ANTICOMPETITIVE CABLE PRICING PRACTICES.

In the 1996 Act, Congress modified the uniform rate requirement so that only bulk discounts to MDUs that are "predatory" are prohibited. In their comments, the cable interests have asked the Commission to read into this modification a congressional intention that the Commission abdicate all responsibility for policing anticompetitive conduct by cable operators They ask, for instance: (1) that the Commission define bulk discounts to include any discount offered to residents of an MDU, whether or not it is a true "bulk" deal with the managing agent for the MDU; (2) that the Commission modify its MDU definition to include all private properties on which multiple residential units exist; and (3) that the Commission apply full federal antitrust standards under its Section 623 predatory pricing analysis. The Commission should reject these suggestions of entrenched monopolists seeking to protect their dominant market position.

A. The Exemption For "Bulk Discounts" Should Not Apply To Services That Are Billed On An Individual Basis.

The Commission should not include within the definition of "bulk discounts" discounts that are offered to MDU residents on an individually-billed basis. In support of such an expansion of the bulk discount exception to the uniform rate requirement, the cable interests have, in their comments, turned the bulk discount exemption on its head. They argue that residents of MDUs should not be discriminated against merely because

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home may use a broadcast antenna to receive local broadcast stations does not convert that DTH system into something other than a DTH system.

[11] The fact that SMATV systems use a broadband cable to connect each unit to the common dish does not convert the SMATV system into a cable system. Even in the single family home context, cable is used to connect a DTH dish to one or more rooms in the subscriber's home.

some of the residents of the MDU are given the option of not taking service.[12] There is no difference, they continue, "between serving an MDU by offering services under a rate negotiated with the building management, or by simply offering the service to all residents of the building."[13]

If accepted, the suggestions of the franchised cable interests would eviscerate any remaining protection to consumers provided by the uniform rate requirement. Indeed, the suggestion that cable operators should be permitted to provide discounts to residents of MDUs solely because they "offer service to all residents of the building" facially violates the basic uniform rate requirement and the Commission's conclusion that residents of MDUs should not get special discounts simply by virtue of the fact that they live in an MDU.

As set forth in OpTel's comments, the uniform rate requirement was intended to protect consumers against price discrimination throughout the franchise area.[14] An exemption for bulk discounts to MDUs was grafted on to the rule in recognition of the fact that certain efficiencies result from providing bulk service to an MDU without regard to the number of subscribers taking service, including the ability to avoid multiple service installations and terminations, a reduction in billing costs, and reduced credit risk to the cable operator. Contrary to the cable interests' contentions, the exception was not added to allow residents in MDUs to receive lower cost service merely by virtue of the fact that they may be less costly to serve because of subscriber concentrations in MDUs. The uniform rate requirement was intended to prevent precisely this kind of discrimination based on cost-of-service factors. Thus, it is not a matter of discrimination against subscribers in MDUs that do not have a bulk deal with the operator. Those subscribers merely will pay what every other individual subscriber in the franchise area pays for cable service — they simply will not get the benefit of a special discount that is permitted for true bulk deals.

This also answers the contention that residents of MDUs that do not have bulk discounts should, nonetheless, "be entitled to enjoy the benefits of competition."[15] Such discounts targeted at MDUs at which a competitor is seeking to provide service benefit neither subscribers as a group nor do they promote competition in the market. The vast

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12 See, e.g., Comments of Adelphia et al., at 31.
13 Comments of Cox at 10.
14 SBC Media Ventures, Inc., 9 FCC Rcd 7175, 7177 (1994).
15 E.g., Comments of Time Warner Cable at 35.

majority of cable customers have no competitive alternative; they are captive of the monopoly franchised cable operator. It is no "benefit" to subscribers to allow cable operators to charge these captive customers artificially high rates in order to support targeted discounts to MDUs at which the subscribers do have competitive alternatives.

B. The Commission Should Not Modify Its MDU Definition.

Just as the franchised cable interests would like to change the definition of "bulk discounts" to expand their ability to price discriminate among their subscribers, they also would like to change the "MDU" definition so that they may target their price discounts at their incipient competitors' subscribers.[16] Indeed, one cable party goes so far as to suggest a new acronym for the kinds of properties that should be included within the MDU definition: "PUDs" (planned unit developments).[17] The plain language of the statute, of course, does not allow for bulk discounts to "planned unit developments," but to "multiple dwelling units."[18] Moreover, as set forth in OpTel's initial comments, other changes made in the 1996 Act strongly suggest that Congress intended to retain the MDU limitation on cable bulk discounts.[19]

Aside from the textual and contextual weakness of their position, however, the cable interests also have been unable to offer any sound public interest basis for the proposed expansion of the MDU definition. Instead, the cable interests insist that the change is necessary to correspond the MDU definition to the private cable exemption.[20] A failure to do so, the Commission is warned, "will afford SMATVs, who already have this pricing flexibility, an unfair advantage." Who is kidding whom? The cable companies hold a monopoly in virtually every local multichannel video distribution market in the United States.[21] Their subscriber counts, in some cases, reach into the

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16 See, e.g., Comments of Cox at 11-12; Comments of NCTA at 45-47; Comments of Cole, Raywid & Braverman at 18-19.

17 Comments of Cole, Raywid & Braverman at 18-19.

18 1996 Act § 301(b)(2); see also Comments of Cox at 3 ("The Commission's rules should instead simply adhere to the plain language of the statute and not include embellishments which have no support in the statute or the 1996 Act's legislative history.").

19 See Comments of OpTel at 7

20 See Comments of Adelphia et al., at 31; Comments of Cole, Raywid & Braverman at 19; Comments of Cox at 12.

21 The Department of Justice, the courts and the Commission have recognized that franchised cable operators are monopolists in most geographic markets. See In re Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168, PP Docket No. 93-253, Comments of the United States Department of Justice at 2 (filed Nov. 20, 1995); In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, ¶ 215 (rel. Dec. 11, 1995); Turner Broadcasting v. FCC, 910 F. Supp. 734, 740 (D.D.C. 1995).

millions. SMATV and private cable operators, by contrast, offer competitive video programming services to a relatively small segment of the market — the only segment of the market in which they thus far have been allowed to compete. A claim that the current MDU definition puts cable operators at a competitive risk from SMATV and private cable operators is wholly incredible.

In any event, just as the bulk exemption was not added to allow cable operators to discriminate among their subscribers based on the relative costs of serving those subscribers, the bulk discount exemption for MDUs was not added to allow cable companies to target discounts only in those areas in which they face incipient competition.[22] The desire to use such targeted pricing to combat SMATV competition, therefore, serves as no support for the suggestion that the Commission should change the MDU definition to correspond to the private cable exemption.

C. The Commission Should Not Rely On Existing Antitrust Standards For Its Section 623(d) Predatory Pricing Analysis.

In their comments, the franchised cable interests have supported the Commission's tentative decision to review claims of predatory pricing under Section 623(d) using existing federal antitrust standards.[23] As set forth in OpTel's initial comments, however, such an interpretation of Section 623(d) would undermine the purpose of the provision and would open the door to additional anticompetitive acts by cable operators.

To begin with, the most fundamental principles of statutory construction dictate that statutes should not be interpreted in a manner that would render them superfluous.[24] There is no reason to believe in this case, therefore, that Congress merely meant to prohibit that which already was prohibited under other laws. Indeed, as the cable interests point out, "federal antitrust law does not prohibit 'predatory pricing' as such. Rather, the federal courts have held that predatory pricing can be an element of the offense of monopolization or attempted monopolization, which violates Section 2 of the Sherman Act."[25] Thus, although predatory pricing may not be a federal antitrust violation, it is expressly actionable under the Communications Act as a result of the 1996 Act amendments. The Commission should not require competing MVPDs to prove a

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[22] SBC Media Ventures, Inc., 9 FCC Rcd at 7177.
[23] See, e.g., Comments of Adelphia et al., at 32; Comments of Cole, Raywid & Braverman at 19-20.
[24] See Comments of ICTA at 14 (citing Sutherland Statutory Construction § 46.06 (1992)).
[25] Comments of Adelphia et al., at 32; see also Comments of Time Warner Cable at 39-40 (under federal antitrust law, "predatory pricing, standing alone, is not actionable").

federal antitrust claim under Section 623(d) when the Congress has required only that the competitor show that the cable operator has priced its service in a predatory manner.[26] For these reasons, OpTel has suggested that, for purposes of enforcing Section 623(d), a discount of more than 25% should be conclusively presumed to be predatory.

In any event, however, even if the Commission decides to use the federal antitrust standard to review claims of predation under Section 623(d), it should require a simple and relatively modest *prima facie* showing for complainants to shift the burden to the cable operator to demonstrate that its prices are not predatory. Naturally, the cable interests have suggested standards for the *prima facie* showing that would allow cable operators to target discounts against competitive entry with impunity.[27] The use of such standards, however, will inhibit entry into the market and slow the growth of competition to these entrenched cable monopolists. Thus, any MDU bulk discount that is "non-uniform," as that term was understood under the Commission's former rules, should constitute *prima facie* evidence of predatory pricing. The only reason that a cable operator would charge residents of an MDU less than it would charge residents of a similarly situated MDU would be to thwart the efforts of a new competitor.

Finally, several cable interests have suggested that complainants be required to show that the MDU in question is "competitively significant" (*e.g.*, that the MDU represents 15% or more of the total number of households in the franchise area).[28] The logic for such a requirement, however, is lacking. The size of the MDU relative to the cable operator's franchise area is unimportant for predatory pricing purposes. The purpose of the provision is to protect incipient competitors seeking to gain a toehold in the market. There is no basis to require that such competitors somehow acquire 15% of the market before they are entitled to such protection. Indeed, the smaller the MDU, the easier it is for a cable operator to extinguish a new competitor attempting to provide service in the franchised area. Thus, any such "competitive significance" test would be entirely inappropriate.

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[26] Accord Comments of Time Warner Cable at 38-40 (arguing that it would be inappropriate to require the prosecution of a full fledged federal antitrust case in a Section 623(d) complaint).

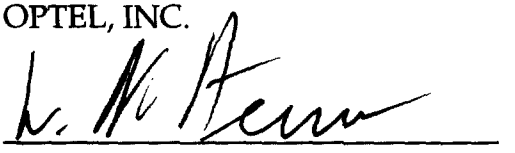
[27] See, e.g., Comments of Cole, Raywid, & Braverman at 20 (suggesting a 50% reduction would be enough to shift the burden); Comments of Time Warner Cable at 40 (suggesting that an operator should be permitted to sacrifice 100% of its margin, as defined by the "average industry cash flow margin," before a discount would be presumed to be predatory).

[28] Comments of Adelphia et al., at 34; Comments of Time Warner Cable at 40-41.

CONCLUSION

As the Commission has recognized, the local multichannel video distribution market is dominated by a few franchised cable operators. The comments filed in this proceeding by these cable interests reflect their desire to maintain their market power. OpTel urges the Commission to discount the suggestions of the cable interests in light of that reality and to promulgate rules in this proceeding that will allow OpTel and others to compete in the MVPD market.

Respectfully submitted,
OPTEL, INC.



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